

APPELLEES' **APPENDIX**

TAB E

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2

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

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ENRON CORP., et al,

Case No.
01-16034
*SEE BELOW

6

Debtors.

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8

October 20, 2005
10:05 a.m.

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United States Custom House
One Bowling Green
New York, New York 10004

11

DIGITALLY RECORDED PROCEEDINGS
(Proceedings - Entire Day)

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10:01 01-16034 ENRON CORP., ET AL
Debtors' objection to certain proofs of claim
filed in connection with the Brazos Financing
Structure.

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10:10 01-16034 ENRON CORP., ET AL
Motion by Debtors Portland General Holdings,
Inc. and Portland Transition Company, Inc.
exhibit chapter 11 cases.

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10:20 01-16034 ENRON CORP., ET AL
Debtors' sixth omnibus motion to deem
schedules amended to modify certain scheduled
claims.

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B E F O R E:

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THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

22

23

DEBORAH HUNTSMAN, Court Reporter
198 Broadway, Suite 903
New York, New York 10038
(212) 608-9053 (917) 723-9898

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2 Calendar: (continued)

3 10:25 01-16034 ENRON CORP., ET AL

4 Scheduling conference re Objection to Notice
5 of Presentment of Order Approving Amended
6 Schedule S to Plan Supplement.

6 Objections filed.

7 11:50 01-16034 ENRON CORP., ET AL

8 Motions filed by the Debtors for approval of
9 Settlement Agreements between Enron Energy
10 Services, Inc., Enron North America Corp.,
11 and Clinton Energy Management Services with
12 the following counterparties:

13 USL Parallel Products of California;
14 Developers Funding Company; Royster Clark,
15 Inc.; 1260 BB Property LLC; Eldona Corp.,
16 W.W. Henry Company; Grand Mandarin; King
17 Manor Care Center; Campus Manor Apartments;
18 Madera Cleaners & Laundry, Inc.; Coin Op.
19 Laundry Milpitas; Renewal Housing Corp. and
20 SCA Packaging North America, Inc.

21 11:55 01-16034 ENRON CORP., ET AL

22 Motion by Debtors for approval of settlement
23 agreement by and among the Enron Parties, the
24 Federal Energy Regulatory Commission's Office
25 of Market Oversight and Investigations, The
California Parties, and the additional
claimants.

11:25 01-16034 ENRON CORP., ET AL

(03-93172) Enron Corp. v. Granite
Construction Co.:

Hearing re request for stay of discovery.

11:45 01-16034 ENRON CORP., ET AL

Debtors' objection to proof of claim number
25267 filed by Exodus Communications
Australia PTY Limited.

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2 Calendar: (continued)

3 12:10 01-16034 ENRON CORP., ET AL
4 Third omnibus motion filed by the Debtors for
5 an order estimating certain contingent or
6 unliquidated claims for purposes of
7 establishing reserves.

8 12:20 01-16034 ENRON CORP., ET AL
9 Debtors' Ninety-Second Omnibus Objection to
10 proofs of claim with respect to claim no.
11 25077 filed by Fireman's Fund Insurance
12 Company.

13 Response filed.

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2 A P P E A R A N C E S:

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2 A P P E A R A N C E S: (continued)

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2 A P P E A R A N C E S: (continued)

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A P P E A R A N C E S: (continued)

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1 Proceedings

2 form of Order.

3 JUDGE GONZALEZ: Does anyone else
4 wish to be heard?

5 (Whereupon, no response was heard.)

6 JUDGE GONZALEZ: No further comment
7 being heard, based upon the pleadings as
8 filed and the representations made on the
9 record, I will grant the relief requested.
10 You may hand up the Order.

11 MS. MAYER: Thank you, Your Honor.

12 JUDGE GONZALEZ: The next matter we
13 have listed is a scheduling conference re
14 Objection to Notice of Presentment of Order
15 Approving Amended Schedule S to Plan
16 Supplement.

17 MS. MAYER: Yes, Your Honor.
18 Sylvia Mayer, again, on behalf of the
19 Reorganized Debtors.

20 Your Honor, the Reorganized Debtors
21 filed an amended version of Schedule S under
22 Notice of Presentment, and an Objection was
23 filed by Baupost/Abrams.

24 Under the confirmed Plan, subject
25 to the ultimate allowance of the claims,

1 Proceedings

2 certain claims are entitled to the benefit of
3 contractual subordination provisions in four
4 pre-petition indentures. Exhibit L to the
5 Plan identified the four pre-petition
6 indentures and set forth the relevant
7 provisions in each of the indentures that
8 define the Senior Indebtedness for purposes
9 of benefiting from the contractual
10 subordination provisions.

11 The four indentures are the 1987
12 Indenture, the TOPRS Indentures, and two
13 indentures referred to as the "MIPS,"
14 M-I-P-S. Schedule S to the Plan Supplement
15 set forth generally the types of claims
16 benefiting from contractual subordination and
17 contained a reservation by the Debtors for
18 the right to amend or modify the schedule.

19 On July 29th, the Reorganized
20 Debtors filed their Amended Schedule S,
21 setting forth in greater detail the claims
22 benefiting from contractual subordination, as
23 well as adding and removing certain claims
24 from the list.

25 One Objection was filed to the

1 Proceedings

2 Amended Schedule S by Baupost/Abrams. They
3 filed the sole Objection.

4 In summary, their Objection seeks
5 to remove from Schedule S with respect to the
6 1987 Indenture Letter of Credit Claims and
7 certain claims that they refer to as
8 "Intercompany Claims," with respect to the
9 TOPRS Indentures, Letter of Credit Claims and
10 certain claims that they deem to be
11 Intercompany Claims, and with respect to the
12 two MIPS Indentures, there are certain claims
13 that Baupost/Abrams deems to be Intercompany
14 Claims.

15 Several Creditors with interest in
16 the letter of credit or Intercompany Claims
17 have responded to Baupost's Objection and
18 assert positions contrary to Baupost's
19 interpretation of these provisions.

20 From the Reorganized Debtors'
21 perspective, this is really an intercreditor
22 dispute. The same amount of money will go
23 out of the estate. It doesn't impact on the
24 funds that are available for distribution.
25 It simply impacts on whom we make the

1 Proceedings

2 distributions to with respect to the
3 contractual subordination provisions.

4 Depending on the outcome of the
5 issues, some of the issues that are raised by
6 Baupost may affect claims that were not
7 identified by Baupost in their Objection. So
8 the Reorganized Debtors have reserved their
9 rights to further modify Schedule S,
10 depending upon the Court's ruling, but
11 otherwise the Reorganized Debtors are
12 effectively neutral as to these issues that
13 are essentially an intercreditor dispute.

14 JUDGE GONZALEZ: All right. Thank
15 you.

16 I assume I will then hear first
17 from Baupost?

18 MR. WINSTON: Good morning, Your
19 Honor. Eric Winston of Stutman Treister &
20 Glatt on behalf of the Baupost Group and
21 Abrams Capital, holders of a substantial
22 number of Enron unsecured claims.

23 As Ms. Mayer pointed out, we were
24 the only Objectors to Schedule S. Our
25 objection focused on --

1 Proceedings

2 JUDGE GONZALEZ: Would you speak
3 louder to make sure the phone is picking up
4 what you are saying.

5 MR. WINSTON: Sure, Your Honor.
6 Our Objection focused on two types of claims.
7 The first type of claim was a claim that in
8 Baupost/Abrams' view was a claim of an
9 affiliate of Enron against Enron. The second
10 type of claim was a claim arising from an
11 obligation of Enron to reimburse issuers of
12 letters of credit.

13 There are some of the claims that
14 we have identified, as not belonging on
15 Schedule S, for whom no responses have been
16 received. Baupost/Abrams submits that, at
17 least with respect to those claimants, they
18 have not carried their burden of proving that
19 they are entitled to benefit from the
20 contractual subordination provisions of the
21 three types of indenture that Debtors'
22 counsel pointed out.

23 With respect to the category of
24 Intercompany Claims, the only claimant that
25 did not respond were the holders of the

1 Proceedings

2 Yosemite Claims. Your Honor, notwithstanding
3 the fact that they did not respond, on Monday
4 we served a notice of withdrawal of our
5 Objections to the Yosemite Claims with
6 respect to the 1987 Indenture and with
7 respect to the two MIPS Loan Agreements.
8 Because of the problems with ECF on Monday
9 and Tuesday, I am not sure if it ever got
10 filed, but we do know a courtesy copy went to
11 the Court. So, hopefully, Your Honor has
12 received it and we wanted to make the record
13 clear. Our Objection, however, still stands
14 against the Yosemite Claims with respect to
15 the TOPRS Indentures.

16 With respect to the Letter of
17 Credit Claims, the following entities did not
18 respond: Toronto Dominion, Australian and
19 New Zealand Banking, Banco Nazionale Intessa
20 BCI, Banco DeRoma and Unicredito. American
21 Express did file a response that was late,
22 but for purposes of this argument, we are
23 going to treat them as if they have responded
24 on time.

25 I have just one other point to

1 Proceedings

2 make, before going into the merits of the
3 arguments. I don't think it is disputed that
4 this dispute is going to turn on the
5 interpretation of contractual law under
6 applicable state laws, and there are only two
7 principles of law that I think need to be
8 highlighted.

9 The first one is assuming that the
10 Court determines that the provisions are
11 ambiguous, the Court has to apply it by
12 meaning. If the Court determines that any
13 provisions are ambiguous, the parties will be
14 entitled to submit parol evidence to support
15 their conflicting interpretations. But the
16 second principle is that no matter what
17 happens, all of the claimants that are
18 seeking to benefit from contractual
19 subordinations carry a heavy burden of
20 proving it. So at the end of the day, it is
21 going to be their burden to show that they
22 are entitled to it.

23 I am not going to repeat all of the
24 arguments raised in the papers, but I thought
25 it would be helpful to break it down as

1 Proceedings

2 follows. I am going to start with the
3 Intercompany Claims with the 1987 Indenture,
4 and then I am going to go to the two MIPS
5 Loan Agreements, and then follow up with the
6 TOPRS Indentures, and then I would turn to
7 the arguments with respect to the Letter of
8 Credit Claims.

9 With respect to the 1987 Indenture,
10 the entire dispute turns on whether or not
11 the claim is held by a "Subsidiary," as that
12 term is defined in the 1987 Indenture. In
13 summary, in order to be a Subsidiary under
14 that indenture, Enron must either directly or
15 indirectly own all of the voting stock of
16 that particular entity, and then the only
17 other issue is whether or not the Subsidiary
18 qualifies as a corporation, as that term is
19 used in the 1987 Indenture.

20 As Baupost and Abrams pointed out
21 in their papers, the term "corporation" is
22 not defined in the indenture, and there is no
23 evidence to indicate that the intent was to
24 limit it to literally corporations, as
25 opposed to LLCs. Just to note, Bankruptcy

1 Proceedings

2 Code Section 1019 does define "corporation"
3 to include LLCs. So it is not unreasonable
4 to think that the undefined term
5 "corporation" in the 1987 Indenture really
6 meant things like corporations, LLCs, and
7 similar business entities.

8 As it currently stands today, the
9 only Intercompany Claim that is objected to
10 with respect to the 1987 Indenture is the
11 claims held by Enron Finance VOF. As
12 JPMorgan pointed out in their Objection,
13 Enron Finance is an LLCs. So for purposes of
14 the 1987 Indenture, Baupost/Abrams submits it
15 qualifies.

16 The key question for Enron Finance,
17 however, is: did Enron have voting control
18 of the entity at the relevant times? As
19 JPMorgan points out and we concede, at the
20 Petition Date not all of the stock for which
21 voting power was attributed was in the hands
22 of Enron. Zephyrus and the entities
23 controlling Zephyrus had preferred interests
24 in Enron Finance for which there was voting
25 control.

1 Proceedings

2 However, as part of the
3 Choctaw/Zephyrus settlement -- and this is
4 unique to Zephyrus and not what occurred with
5 Cherokee -- the membership interests held by
6 Zephyrus in Enron Finance were redeemed by
7 Enron and thereafter cancelled. So at the
8 moment of that settlement, which occurred
9 prior to the Effective Date of the Plan, all
10 of the voting control in Enron Finance was
11 held by Enron either directly or indirectly.

12 So for purposes of the 1987
13 Indenture, we believe that at the moment of
14 the Effective Date, which we believe is what
15 counts for purposes of distributions to
16 holders of subordinated notes which are
17 upstream to holders of Senior Indebtedness
18 under the 1987 Indenture, Enron Finance
19 counts as a Subsidiary.

20 Assuming I am wrong -- which I
21 don't believe I am, but assuming I am
22 wrong -- one of the two claims held by Enron
23 Finance is actually a claim assigned to Enron
24 Finance by an entity known as ECIC. ECIC is
25 clearly a corporation. I don't think there

1 Proceedings

2 is any dispute about that. There is no
3 evidence to indicate that its voting power
4 was ever held by anyone other than Enron.
5 Neither Enron Finance nor the assignees of
6 claims that were once held by Enron Finance
7 can have rights superior to those of ECIC for
8 purposes of determining contractual
9 subordination benefits.

10 So Baupost/Abrams submits that the
11 Enron Finance claims listed on Schedule S
12 with respect to the 1987 Indenture should be
13 taken off.

14 Unless Your Honor has any
15 questions, let me turn to the 1993 and 1994
16 Loan Agreements. These two Loan Agreements
17 have substantially the same definition of
18 "Senior Indebtedness." This definition
19 states that all indebtedness of Enron,
20 whether outstanding on the date of the Loan
21 Agreements or thereafter created, incurred,
22 or assumed which is for money borrowed or
23 evidenced by a note or similar instrument
24 given in connection with the acquisition of
25 any business, property, or assets that is

1 Proceedings

2 counted for Senior Indebtedness.

3 Unlike either the 1987 Indenture or
4 the TOPRS Indentures, the term "indebtedness"
5 is not defined in any meaningful way.
6 Actually, let me step back. The term
7 "indebtedness" is not defined as it was
8 defined in the 1987 Indenture, and
9 indebtedness is not defined in the TOPRS
10 Indentures. Unlike the 1987 Indenture or the
11 TOPRS Indentures, there are no express
12 inclusions or exclusions. All we have is the
13 words in front of us, "all indebtedness,"
14 which is for money borrowed or evidenced by
15 note.

16 It is Baupost/Abrams' position that
17 the term "indebtedness," as used in these two
18 Loan Agreements, is ambiguous, and that parol
19 evidence is permissible to clarify the
20 meaning of the term for purposes of showing
21 that claims held by affiliates, which
22 Baupost/Abrams calls "Intercompany Claims,"
23 were never intended to be included in the
24 universe of claims to benefit from
25 contractual subordination.

1 Proceedings

2 There are two facts I would like to
3 bring to the Court's attention, one of which
4 I think is just within the loan documents
5 themselves and the one that comes from
6 outside the loan documents.

7 The first is these two Loan
8 Agreements were executed between Enron and
9 its affiliate. There was no indenture that
10 set forth the terms of who gets the benefit
11 from contractual subordination. Unlike the
12 1987 Indenture and unlike the TOPRS
13 Indentures, this was a straight, inside loan
14 transaction. So there is really no third
15 parties kind of vetting what is meant by
16 "Senior Indebtedness" for purposes of the two
17 Loan Agreements.

18 Then, as Your Honor would have seen
19 in our initial opening papers, the
20 prospectuses that went to accompany the MIPS
21 transactions, for which the two Loan
22 Agreements were integral to those two MIPS
23 transactions, stated that the amount of
24 Senior Indebtedness reported on a
25 consolidated basis was a certain number -- it

1 Proceedings

2 was, I think, \$3.2 billion -- as of 1993 or
3 1994. The key fact of the prospectuses is
4 that for purposes of determining Senior
5 Indebtedness, at least in this extrinsic
6 document, it was reported on a consolidated
7 basis. So you would remove what would be
8 true Intercompany Claims. I don't think
9 there is any dispute here that the
10 counterparties to the two Loan Agreements
11 were affiliates of Enron. So we believe the
12 parol evidence will show that there was no
13 intent to include Intercompany Claims as the
14 type of claim that would benefit from
15 contractual subordination.

16 JUDGE GONZALEZ: What difference
17 does that make? If you have the documents
18 themselves indicating subordination, what
19 difference does it make whether you think the
20 perspective reflects an intention not to have
21 Intercompany Claims considered Senior
22 Indebtedness?

23 MR. WINSTON: Your Honor's point is
24 well taken, assuming that the definition of
25 Senior Indebtedness in those two Loan

1 Proceedings

2 Agreements is unambiguous. As I opened this
3 part of the presentation, the term
4 "indebtedness" is not defined. It is a term
5 that is defined in other indentures, so it is
6 one that is subject to more than one meaning.
7 In this particular case with this particular
8 type of definition in these two Loan
9 Agreements, it is Baupost/Abrams' position
10 that there is no way to determine on the face
11 of the documents that that term is
12 unambiguous in including Intercompany Claims,
13 and so you go to parol evidence.

14 Now, it is possible -- I doubt
15 it -- but it is possible that the parties
16 that are seeking to include their claims will
17 be able to generate parol evidence to show
18 there was an intention, but that is for a
19 later day. But for purposes of what is
20 before the Court now, if the Court determines
21 that term is ambiguous, we go to the next
22 step. If the Court determines it is
23 unambiguous, then I guess I am done. But I
24 think that term, certainly when you compare
25 it to the other indentures, is one which is